No. 93-13

In The

Supreme Court of the United States

October Term, 1993

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, LEWIS EPPOLITO AND FIROZ KHAN,

Petitioners,

v.

MERLA RICE,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California (Second Appellate District, Division One)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN ELSON
1040 S. Longwood Avenue
Los Angeles, California 90019
(213) 937-0246

Counsel of Record for Respondent MERLA RICE

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I

QUESTIONS PRESENTED FOR REVIEW

1. May a California state court employ an "abuse of discretion" standard of review when considering a trial court finding of waiver, made under state law, of an alleged federal right to compel arbitration of an employment dispute?

2. Is there substantial evidence in the record which would support the finding of waiver, made under state law, of the alleged right to compel arbitration of the within employment dispute?

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II

THIS CASE DOES NOT WARRANT DISCRETIONARY REVIEW

This case is not a one which warrants review given the Supreme Court's considerations of when certiorari may be granted. Rule 10 of this Court's rules provides in pertinent part that

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when

there are special and important reasons therefor, such as:

(a) When a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rules of the Supreme Court, Rule 10.1.

In this case a trial court made a finding of waiver of any alleged contractual right[1] petitioners were supposed

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[1] Petitioners based their right to compel arbitration on an NASD Form U-4 (Clerk's Transcript ["CT"] 704-708) which respondent signed when registering with the NASD as a representative of Pruco Securities Corp. several years after going to work for petitioner Prudential Life Insurance Co. of America. The trial court had expressed considerable skepticism on March 15, 1990, as to whether the arbitration clause in that form even applied to the claims being made by respondent, and indicated

to have had to compel respondent to arbitrate her employment related claims, rather than have them decided by a jury (petitioners' appendix at 21-22). In an unpublished decision the California court of appeal affirmed the trial court''s finding of waiver (*id.* at 11-18). In so doing the court of appeal stated that under either an "abuse of discretion" or the "de novo" standard of review the trial court was authorized to have found a waiver of the alleged right to compel arbitration (*id.* at 16).

There is no federal question requiring resolution by the Court arising from the state court's choice, or application, of the standard of review to be applied to the trial court's finding of waiver. This is the case because matters of appellate procedure may be defined and employed by state courts deciding federal questions, and a state court doing so does not decide a "federal question" merely by its choice of a standard of review even if a federal statutory right is being substantively considered.

In *Fletcher v. Weir,* 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982) the Court stated

> The principles which evolved on the basis of decisional law dealing with appeals within the federal court system are not, of course, necessarily based on any constitutional principle. Where they are not, the states are free to follow

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that in the court's view respondent's claims were outside the ambit of the arbitration agreement upon which petitioners have chosen to rely (Reporter's Transcript ["RT"] I at 86-87). The scope and effect of the arbitration clause in question is addressed in section IV, infra.

> or to disregard them so long as the state procedure as a whole remains consistent with due process of law.

455 U.S. at 605, 102 S. Ct. at 1309, 71 L. Ed. 2d at ___, citing *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368 (1973).

Despite the holding by the court of appeal in this case that under either standard of review the trial court could correctly have made a finding of waiver, petitioners argue that a "de novo" standard of review is **required** because some of the federal circuits employ such a standard when reviewing issues of waiver (petition at 19-20), and that under the de novo standard the facts of this case preclude a finding of waiver (*id.* at 21-24).

This Court has by its teaching in *Ware*, supra, already rejected the former argument advanced by petitioners, and the facts of this case belie the latter.

III

AMPLE EVIDENCE OF CONDUCT AMOUNTING TO WAIVER IS IN THE RECORD

A. The trial court did not refuse to hear petitioner's petition to compel arbitration in January of 1990.

In their petition before this court petitioners assert that "[i]n early January [of 1990] the trial court would not hear [their] motion to compel arbitration on statutory notice, thereby delaying the first hearing until mid-March" (petition at 5). That assertion is false.

As the California court of appeal stated, when suit was filed it was assigned to one judge for all purposes pursuant to California's Trial Court Delay Reduction Act (petitioners' appendix at 2). When petitioners' then attorney called in "mid-January of 1990" to reserve a law and motion hearing date on the petition, she claimed she was told there were no open slots on the court's law and motion calendar until March (CT 1418-1419).

There was *absolutely no effort made by petitioners* to make an ex parte application *requesting an earlier hearing date*, at they should have done, and in fact as they did on January 12, 1990, the day after respondent refused arbitration, when petitioners filed an ex parte application to shorten time for service of a motion seeking to compel discovery from respondent (petitioners' appendix at 6, footnote 4).

This blasé approach to seeking to compel arbitration at the earliest possible moment nonplussed the California trial court and court of appeal, and explains why petitioners were deemed to have waived whatever alleged right they claimed to force respondent to arbitrate her claims.

Furthermore, while fully aware that the court's intervention to compel arbitration would be necessary, petitioners themselves made the most of every opportunity in February and early March to drag respondent before the trial court for law and motion matters before the petition to compel arbitration was scheduled to be heard in mid-March.

B. Petitioners' conduct before April 2, 1990[2] as waiver.

Petitioners have omitted significant portions of the procedural history in their presentation of the facts of the case, and these events explain why waiver was quite properly found by the trial court and affirmed by the court of appeal. As the court in *Zimmerman v. Drexel Burnham Lambert, Inc.* (1988), 205 Cal.App.3d 153, 252 Cal.Rptr. 115, observed

> Prejudice is derived from the fact that the opposing party must bear the costs of trial preparation, which arbitration is designed to avoid [citations] and also results from the disclosure of defenses and strategies [citations].

Id. at 159-160, 252 Cal.Rptr. at 118.

Here respondent contended in the trial and appellate courts that by March 14th, when petitioners' first petition to compel arbitration was ordered off calendar due to the slovenly manner in which the matter had been presented[3], and inarguably by May 4th, literally on the eve of trial when the second petition was heard, sufficient conduct inconsistent with the intent to invoke arbitration had occurred.

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[2] This was the date on which defendants had a hearing on their motion for summary judgment, which the court denied in its entirety (CT I at 1839).

[3] As the appellate court noted, the trial court commented that petitioners' first petition to compel arbitration, ordered off-calendar on March 14, 1990, for its numerous defects, was "one of the sloppiest jobs [it had] seen in a long time" (petitioners' appendix at 4).

Respondent further contended this course of conduct by the petitioners had caused substantial prejudice to respondent in the form of costs and expenses, including attorney's fees, as well as revealing respondent's litigation strategy.

By the time petitioners had a hearing on their motion for summary judgment they had had the benefit of massive discovery, which had been very expensive for respondent. Though petitioners claim to have first become aware[4] in December of 1989 of their alleged right to seek arbitration (petition at 8), in January they sought to depose plaintiff despite the fact that the NASD code upon which they base their right to compel arbitration (CT I 1270-1291) does not allow for oral depositions as a matter of right but only for document exchanges on a modest scale (CT I at 1284).

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[4] This is not a tenable proposition in California. As a matter of law petitioner Prudential **always had constructive knowledge** of its alleged right to arbitrate. It is well settled in California that the "[m]eans of obtaining knowledge is equivalent to knowledge in the absence of circumstances preventing investigation", *Wool v. Scott* (1956) 140 Cal.App.2d 835, at 844. In this case there were certainly no circumstances caused by respondent which prevented petitioner Prudential from investigating and discovering its alleged right to compel arbitration, and Prudential certainly had the means to obtain knowledge of its arbitration agreement since petitioners' counsel stated in a declaration that he discovered the arbitration agreement in December of 1989 in the local Prudential office where respondent had been employed (CT 1424-1425).

1. Discovery.

The Federal Arbitration Act, 9 USC §§ 1-12, is virtually silent on what discovery, if any, is allowed in arbitration proceedings. It is generally accepted that if a party seeking to compel arbitration has initiated discovery, that party has waived the right to compel arbitration since discovery is generally viewed as conduct inconsistent with the right to invoke arbitration.

For example, in *Peterson v. Shearson/American Express, Inc.* (10th Cir. 1988) 849 F.2d 464 the party seeking arbitration had deposed witnesses, as have petitioners here. The court held that by deposing witnesses, a procedure unavailable at arbitration, defendants had waived their right to compel arbitration.

Here, petitioners' unbridled resort to discovery unavailable to them in arbitration was drawn to the court's attention when respondent opposed the first petition to compel arbitration (CT I at 1220-1328). As of the close of business on Tuesday, March 6th, when respondent filed her opposition to the first petition to compel, petitioners had noticed the following depositions:

DEPONENT	DATE	TIME
Robert Kalmansohn, M.D.	3/8/90	9:30 a.m.
Juan Drachenberg, M.D.	3/8/90	2:30 p.m.
Bernard Kirzner, M.D.	3/9/90	9:30 a.m.
Lyle Rapp, M.F.C.S.	3/9/90	1:30 p.m.
George Jay	3/10/90	9:30 a.m.
Cathy Goodman, Ph.D.	3/12/90	9:30 a.m.
A.S. Montesi, Ph.D.	3/12/90	1:30 p.m.
Susan Nathe	3/13/90	3:00 p.m.
Joseph Gambone, M.D.	3/14/90	9:30 a.m.

DEPONENT	DATE	TIME
Samuel Pang, M.D.	3/14/90	1:30 p.m.
Gordon Griggs, M.D.	3/15/90	9:30 a.m.
M. Joel Scheinbaum, M.D.	3/15/90	1:30 p.m.
M. Joel Scheinbaum, M.D.	3/16/90	9:30 a.m.
Andrew Sawchuk	3/21/90	9:30 a.m.
James Rodriguez	3/21/90	2:00 p.m.
Sima Jonoobi	3/22/90	9:30 a.m.
Robert Shelton	3/23/90	9:30 a.m.
Susan Martz	3/23/90	3:00 p.m.
Robert Yanez	3/29/90	9:30 a.m.

(CT I at 1226-1227.)

Furthermore, petitioners had as of March 7, 1990, a week before their petition was to be heard on March 14th, deposed respondent for ten full working days (CT I at 1226; CT II[5] 83-92), as well as respondent's husband and one of her co-workers at Prudential, John Raimo (CT I at 1226), with a total cost to petitioner of $ 25,500.00 for attorney's fees (CT I at 1227). Respondent had also incurred attorney's fees in the amount of $ 2,500.00 in responding to numerous sets of petitioners' interrogatories, which would not have been available to them in arbitration (*id.*).

Accordingly, under the approach taken by federal courts upon whose decisions petitioners rely, by engaging in discovery unavailable to them in arbitration, such as

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[5] CT I and RT I refer to the clerk's and reporters' transcripts prepared prior to January of 1991 when another all purpose judge was assigned to the case in the Los Angeles Superior Court, and CT II and RT II refer to the clerk's and reporters' transcripts prepared after January 1, 1991.

deposing witnesses and propounding interrogatories, petitioners waived the right to compel arbitration.

2. Petitioners' resort to law and motion.

Prior to having their first petition to compel arbitration heard petitioners were regularly before the trial court as the moving parties in various law and motion matters. As of February 15, 1990, petitioners had filed motions (a) to compel respondent's deposition to go forward, (b) to compel the production of documents, (c) to discover respondent's sexual conduct, and (d) to compel a psychiatric examination of respondent (CT I at 236-280, 724-838, 842-875).

As the California Supreme Court observed in *Keating v. Superior Court* (1982) 31 Cal.3d 584, 183 Cal.Rptr. 360, rev. on other grounds sub. nom. *Southland Corp. v. Keating* (1984) 465 U.S. 1,

> We have recently acknowledged that while there is no "single test" in establishing waiver, the relevant factors include whether the party seeking arbitration (1) has "previously taken steps inconsistent with an intent to invoke arbitration", (2) "has unreasonably delayed" in seeking arbitration, (3) or has acted in "bad faith" or with "willful misconduct". [Citation] We have stressed the significance of the presence or absence of prejudice. Waiver does not occur by mere participation in litigation, there must be "judicial litigation of the merits of arbitrable issues" [citation], although "waiver could occur

> prior to a judgment on the merits if prejudice could be demonstrated" [citation].

Id. at 605, 183 Cal.Rptr. at 372.

As review of petitioners' conduct reveals, they did their level best to litigate this case to death on a piecemeal basis. Accordingly, the trial court was fully justified in finding that petitioners waived any alleged right to compel arbitration by resort to the judicial machinery in such a way that is entirely inconsistent with an "intent to invoke arbitration".

Petitioners filed their first petition to compel arbitration on February 2nd, setting it for hearing for March 14. However, they filed motions on February 14th (CT I at 724-838, 842-875) to obtain and/or compel discovery which was not available to them under the NASD code, with those motions to be heard on March 1st, before petitioners had their petition heard on March 14th.

Petitioners have *never* offered an explanation as to why they did not seek to have the trial court hear their request to compel arbitration on March 1st, when their three discovery motions were to be heard, after they knew in early January that respondent would not agree to arbitrate her claims. Petitioners obviously timed their law and motion matters to obtain maximum use of the judicial machinery *before* the hearing on their request to have respondent ordered to arbitrate her claims. The timing of these law and motion matters was conduct sufficiently reeking of "bad faith" under *Keating* to justify a finding of waiver without more.

When their petition to compel arbitration was heard on its merits on May 4, 1990, the trial court pointed out to

petitioners' counsel that on March 15, 1990, the court had raised with counsel "the question as to whether this motion was timely in view of all that had taken place" (RT I at 86-87). At that time, petitioners had not even had their Motion for Summary Adjudication heard.

Doubtless the trial court had in mind the extensive discovery (ten days of plaintiff's deposition) and numerous law and motion proceedings in which petitioners had engaged prior to mid March when the first petition to compel arbitration was ordered off-calendar.

C. Submission of the motion for summary judgment as waiver.

Petitioners are curiously silent on the subject of having had a hearing in the trial court on April 2, 1990, on their motion for summary judgment. Their silence is telling in light of the position they took in the court of appeal in March of 1990 following the trial court's ordering the petition set for hearing on March 14th off calendar.

After that petition was ordered off calendar, petitioners again freely sought through law and motion orders that were not available in arbitration. The most significant of which was proceeding to have a hearing and submission of the motion for summary judgment on April 2nd.

Petitioners sought extraordinary relief in late March from the appellate panel of the court of appeal which ultimately heard the appeal. In their petition for extraordinary relief petitioners argued that "the hearing on

petitioners' Motion for Summary Adjudication of Issues, which will constitute submission on the merits and may, therefore, waive arbitration and moot this appeal, is scheduled for April 2, 1990 . . . " (CT 2662-2663).

Under California law, petitioners "having made the contention, may not now deny it to suit their present needs. One may not alter one's appellate argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment", *Aerojet-General Corp. v. Superior Court* (1989) 211 Cal.App.3d 216, upon denial of rehearing at page 240, 258 Cal.Rptr. at 684, 686.

D. Conduct inconsistent with arbitration after the summary judgment hearing.

On April 19th petitioners made ex parte applications to be allowed to complete expert witness discovery past the cut-off date (CT I at 2155-2172, 2279-2280), and to compel respondent to make additional appearances for a psychiatric examination (CT I at 2174-2181, 2193-2229). The court denied the former and granted the latter (CT I at 2281) which required respondent to return for several more hours of testing and interviewing at the office of the psychiatrist hired by petitioners to testify against respondent.

On April 19th petitioners filed their second petition to compel arbitration, setting it for hearing on Friday, May 4th, the last court day prior to the trial date of May 7th (CT I at 2285-2374).

Additionally, by the time of the second petition to compel arbitration petitioners had required respondent to

reveal her strategy in these numerous law and motion proceedings, not the least of which was opposing petitioners' Motion for Summary Judgment, which the court denied on April 2, 1990 (CT I at 1839).

Under each of the possible bases of prejudice articulated by the court in *Zimmerman*, the trial court on May 4th quite properly held that petitioners were deemed to have waived the right to compel arbitration of any of respondent's claims in this case. Under any standard of review the California court of appeal quite properly upheld the trial court's finding of waived by petitioners.

IV

RESPONDENT NEVER AGREED TO ARBITRATE HER CLAIMS AGAINST PETITIONERS

Petitioners argue that upon the grant of certiorari the Court should remand with instructions to enter on order compelling respondent to arbitrate her claims (petition at 24-27). Such an order by the Court would be premature in that the California courts have not yet passed upon the scope of the arbitration clause in question, which is a matter of contract interpretation for the state courts, not this Court. Indeed, the court of appeal remanded for the trial court to do exactly that with regard to the claims added by respondent's third amended complaint (petitioners' appendix at 18-20).

Respondent nonetheless will briefly address the issue of arbitrability out of an abundance of caution.

A. The applicable law.

It has been cited as the "first principle of arbitration" (*AT&T Technologies, Inc. v. Comm. Workers of America* (1986) 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L. Ed. 2d 648) that only those disputes which are the subject of the arbitration clause are those which must be submitted to arbitration. This Court held as much over a generation ago when it stated that

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

Atkinson v. Sinclair Refining Co. (1962) 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L. Ed. 2d 462.

That is as much a part of California jurisprudence as it is in the federal system. As the California Supreme Court observed, "[t]he scope of arbitration is, of course, a matter of agreement between the parties . . . ", *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323, 197 Cal.Rptr. 581, 587. The California Supreme Court in passing recently reaffirmed the validity of the notion that the arbitrator has no power to " . . . stray[] beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate", *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 28, 10 Cal.Rptr.2d 183, 200.

The critical inquiry in determining if a dispute is subject to arbitration is the contract itself, or if no single document contains the complete contract, those writings which together comprise the agreement to arbitrate. Examination of them in this case reveals why the clause

relied upon by petitioners has no application to respondent's claims.

B. The writings which comprise the alleged agreement to arbitrate.

The form U-4 (CT 704-708) does not contain any definition as to the scope or arbitrable matters, the identities or particular specialties of those selected to be arbitrators, or discovery which would be permissible in an arbitration taking place pursuant to the NASD rules. **All of these terms are found in the "CODE OF ARBITRATION PROCEDURE" (CT 1270-1290) issued by the NASD.**

For that reason California *Civil Code* § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together") applies. Reference to other writings reflecting the agreement's terms is therefore mandated under California law. As one frequently cited case put it,

> In construing the contract the court should strive to ascertain its object as reflected in the provisions thereof [citations]; **should be guided by the intention of the parties as disclosed by those provisions** [citations]; **should endeavor to effect the intention and object thus ascertained . . .**

Harris v. Klure (1962) 205 Cal.App.2d 574, at ___, 23 Cal.Rptr. 313 at 315.

Guided by these teachings the court must look at the facts of the case to determine the object of the contract and intentions of the parties.

C. The object of the agreement to arbitrate.

In determining the object of any contract, reference to the parties and their relationship to each other is one of the first steps in interpretation of the contract. Here, the purportedly contracting parties are respondent Merla Rice and Pruco Securities Corporation, a wholly owned subsidiary of petitioner Prudential. The purported agreement to arbitrate only relates to any claims she may have against Pruco arising out of plaintiff's offering of any Pruco products or services. **Pruco is neither a party to this lawsuit, nor do any allegations of the facts constituting the multiple causes of action pleaded in any way implicate the services offered by Pruco.** In the matter at bench respondent was employed by petitioner Prudential, and her supervisors were petitioners Kahn and Eppolito.

The NASD "Code of Arbitration Procedure" (CT 1270-1291) refers to securities industry and clearing controversies. It is a stretch beyond the limits of logic to interpret these terms to apply to an insurance salesperson, such as respondent, suing her superiors at the insurance company for sexual harassment.

The object of the contract to arbitrate securities industry and clearing controversies has no application to the claims which are the subject of respondent's suit against petitioners.

D. Divining the intentions of the parties.

1. The NASD exception for insurance companies removes this case from the scope of NASD arbitration.

Looking at the documents (the U-4 form and the "CODE OF ARBITRATION PROCEDURE") which comprise the alleged agreement to arbitrate, one sees very quickly that the intention of the parties, from an objective standpoint, was to insure that disputes regarding securities offered and/or sold by respondent on behalf of Pruco Sales Corp. were resolved through arbitration, rather than before a court.

The NASD document entitled "CODE OF ARBITRATION PROCEDURE" states that with regard to "matters eligible for submission", that

> This code of arbitration procedure is prescribed and adopted . . . for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the association [National Association of Securities Dealers], **with the exception of disputes involving the insurance business of any member which is also an insurance company . . .** [Emphasis added]

(CT I at 1273). In its introduction defining the scope of arbitral matters, the NASD Code excludes, with its use of the broadest possible language, any disputes involving the insurance business of any member of the NASD which is also an insurance company. It is difficult to read this language and still conclude that respondent's dispute

with her employer, an insurance company, would nonetheless be subject to arbitration under the NASD code.

2. The requirement that the arbitrators be drawn from the securities industry.

With regard to the composition of the panel of arbitrators, § 9 of the code specifies that those persons to sit as arbitrators "shall be from the securities industry" (CT I at 1275). A court construing these documents as an agreement to arbitrate must "look to the contract itself and interpret it so as to give effect to the intent of the contracting parties" (*Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, at 1004, 119 Cal.Rptr. 130 at 133).

Given that the arbitrators in NASD arbitrations "shall be from the securities industry", it is clear that the arbitration agreement was meant to apply to individuals employed in the securities industry involved in transactions in securities. The scope of arbitral matters was not designed to include those persons, like respondent, who were employees of insurance companies, such as petitioner Prudential, who routinely had their sales agents register with the NASD merely so that those sales agents could, from time to time, provide financial services such as the sale of an annuity which arguably might be considered a "security".

3. The NASD arbitration clause contained in the form signed by petitioner has been held to apply only to disputes over commissions and securities industry "clearing controversies".

In a pair of sister-state opinions courts have considered the identical NASD Form U-4 and held that it does

not enjoy the sweep that petitioners advocated in this case.

In *Transamerica Financial Resources, Inc. v. Rondini* (1989) 545 N.E.2d 789, 189 Ill.App.3d 853, the employer, a securities brokerage firm, had sued a former employee to collect on a loan made to the employee. The employee had argued that the matter should be arbitrated because he had signed a NASD U-4 agreement mandating arbitration of all disputes arising out of the employer's securities business. The employer resisted arbitration on the ground that the suit involved a simple collection matter, not the trading business of the brokerage house which was within the purview of the NASD arbitration agreement.

The court held that the proper focus of the analysis was whether the claim in issue arose out of the transacting of the securities business, which would make it arbitrable, or whether it was merely an employment matter unrelated to the business of the brokerage house. After reviewing the facts and the law on the subject, the court held that

> . . . [the employer's] claim against defendant constitutes a simple collection matter arising out of the parties' employment relationship and has **no connection with its business as a retail broker of securities.**

Transamerica at 545 N.E.2d at 791. The case was followed by the Alabama Supreme Court's decision in *A.G. Edwards & Sons, Inc. v. Clark* (1990) 558 So.2d 358, which also construed the identical NASD arbitration agreement in issue in the matter at bench.

In *Edwards* an employee of a brokerage house sued a competitor in another brokerage house and that brokerage house for defamation. Defendants sought to compel arbitration based upon the NASD Form U-4 which the plaintiff had signed. The trial court denied the petition and the defendants appealed.

In affirming the trial court the Alabama Supreme Court pointed out that

> Section 8 of the NASD Code is included in Part II of that Code, labeled "INDUSTRY AND CLEARING CONTROVERSIES." Section 8 is intended to apply only to disputes related to the securities business. The fact that [defendant] Thompson was employed by a securities firm does not mean that every tort he commits creates an arbitrable "Industry" or "Clearing" controversy. . . .
>
> The NASD Code does not mandate arbitration for "*any* claim against a member," as the defendants would have us interpret it; it mandates arbitration of any claim "arising in connection with the business" of a member or "in connection with the activities" of an associated person. . . .
>
> By its very nature, the "business" of the members of the NASD is the trading of securities, and while arbitration clauses are to be interpreted broadly, they are not limitless and cannot be interpreted to include matters that clearly fall outside the scope of the contract agreement.

558 So.2d at 362, 363.

CONCLUSION

This case has no business taking the time of this Court. The California courts quite properly found waiver of any alleged right to arbitrate, and no federal question is presented by that finding.

Accordingly, the petition for certiorari should be DENIED.

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JOHN ELSON
1040 S. Longwood Avenue
Los Angeles, California 90019
(213) 937-0246

Counsel of Record for
Respondent MERLA RICE